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Ernest Howard Campbell

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PROCEDURAL DUE PROCESS IN THE CANCELLATION OF AIR MAIL ROUTE CERTIFICATES

ERNEST HOWARD CAMPBELL

(Continued from July Issue)

VII PROCEDURAL DUE PROCESS AND THE CANCELLATION ORDER

One of the most controverted questions presented by the air mail litigation was whether the constitutional requirements of procedural due process embraced by the Fifth Amendment of the Federal Constitution were offended by the failure of the Postmaster General to afford notice and hearing to the holders of the air mail route certificates involved prior to the issuance of the wholesale and summary cancellation order. The three opinions of members of the Court of Claims in *Pacific Air Transport et al v United States, supra*, do not even take cognizance of this question. Yet it would seem that this question deserves careful and critical consideration and examination.

In approaching the question of which method could or should have been invoked, it should be remembered that the primary reasons assigned by Farley for the cancellation of the certificates were: (1) Payment of excessive compensation to the holders of air mail route certificates for the transportation of air mail (2) The allocation of air mail route certificates to a few large corporations contrary to the congressional intent (3) Participation in the so-called May-June Spoils Conferences of 1930 and the alleged agreement made at these conferences to apportion and divide territory and the consequent elimination of competitive bidding. It is clear that at the time of the cancellation of the air mail route certificates both the President and the Postmaster General were invested with broad discretionary powers to cancel air mail route certificates independent of any collusion, fraud, agreement to prevent competitive bidding, or unlawful conduct of any sort on the part of the holders of the air mail route certificates in the acquisition of such certificates. Even when such certificates have been lawfully acquired, the public interest at a later date may require their cancellation.

In canceling the air mail route certificates, Postmaster General Farley relied upon Section 3950 of the Revised Statutes of the United States and upon "the general powers of the Postmaster General."

While the term "due process" is not susceptible of specific definition and courts have preferred to define it only when presented with concrete cases, the United States Supreme Court has defined "due process" as being in the language of Mr. Webster:

"the general law, a law which hears before it condemns,

which proceeds upon inquiry, and renders judgment only after trial' ⁷⁷⁸

The principle has been established by the Supreme Court of the United States that under any grant of power, whether statutory or general, and whether notice and hearing are specified in such grant or not, such power depriving persons of property pursuant to a *quasi-judicial* determination by an administrative body can only be exercised pursuant to the constitutional requirements of prior notice and hearing, save perhaps in certain matters involving the exercise of the police power. The courts customarily read these constitutional requirements into grants of administrative power in order to sustain the constitutionality of such grants. Were it not for such necessary implication, the grant itself, as well as many acts performed under the terms thereof, would be unconstitutional and void ⁷⁹

Since *Connecticut General Life Insurance v Johnson*,⁸⁰ it is significant that the due process clause has not been invoked to declare legislation unconstitutional affecting property rights. However, since 1937 substantive due process has been frequently employed to hold invalid invasions of civil liberties. While substantive due process has been substantially narrowed in the scope of its operation, procedural due process still remains with undiminished force ⁸¹

Notice and an opportunity to be heard, granted to those whose life, liberty, or property are affected by governmental prerogative, have always been of the essence of procedural due process. The Bill of Rights of the Federal Constitution contains fundamental law limitations upon the power of the government, legislative, as well as executive and judicial. It has been recognized that the postal power, like all other powers of the federal government, is subject to the limitations of the Bill of Rights ⁸²

In *Lipke v Lederer*,⁸³ in which the Supreme Court of the United States held that an injunction should issue against the Collector of Internal Revenue who threatened to seize property in collection of taxes assessed on the ground that he failed to accord an opportunity for hearing upon notice to the person whose property was thus attempted summarily to be disposed of, the Collector of Internal Revenue pur-

⁷⁸ *Ex parte Wall*, 107 U. S. 265, 289 (1882); *Dartmouth College v Woodward*, 4 Wheat. 519, 4 L. ed. 629 (1819); T. M. COOLEY, 2 CONSTITUTIONAL LIMITATIONS, Boston, Little, Brown & Co. (1927) 736.

⁷⁹ *Southern Railway Co v Virginia*, 290 U. S. 190, 54 Sup. Ct. 148; 78 L. ed. 260 (1933).

⁸⁰ 303 U. S. 77, 58 Sup. Ct. 436, 82 L. ed. 873 (1938).

⁸¹ BENJAMIN F. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW, Boston, Houghton Mifflin Co. (1942) 223, 240.

⁸² *Burton v United States*, 202 U. S. 344, 26 Sup. Ct. 688, 50 L. ed. 1057 (1906).

⁸³ 259 U. S. 557, 562, 42 Sup. Ct. 549, 66 L. ed. 1061 (1921); See: *Smith v Foster* (S. D., N. Y.), 15 F. (2d) 115 (1926).

ported to act under the National Prohibition Act, which empowered him to make such seizure, but which contained no specific reference to the constitutional requirement of notice and hearing. The claim of adverse interest of the United States did not serve to prevent the Court from directing the issuance of the injunction. The Supreme Court stated:

"Section 35 prescribes no definite mode for enforcing the imposition which it directs. Before collection of taxes levied by statutes enacted in plain pursuance of the taxing power can be enforced, the taxpayer must be given fair opportunity for hearing—this is essential to due process of law. Certainly we cannot conclude, in the absence of language admitting of no other construction, that Congress intended that penalties for crime should be enforced through the secret findings and summary action of executive officers."

In *Ochoa v. Hernandez y Morales*,⁸⁴ the United States Supreme Court, speaking through Justice Pitney, pointed out that notice and an opportunity for hearing are the rock bottom foundations of due process. The Court stated:

"Without the guaranty of 'due process' the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle known to the common law before Magna Carta, was embodied in that charter (Coke, 2 Inst. 45, 50) and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever also may be said about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

In *Interstate Commerce Commission v. Louisville and Nashville Railroad Company*,⁸⁵ the Court observed:

"In the comparatively few cases in which such questions have arisen, it has been distinctly recognized that administrative orders, *quasi-judicial* in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence.' " (Italics supplied)

In *Unity School of Christianity v. Federal Radio Commission*,⁸⁶ the Court of Appeals of the District of Columbia reversed a decision of the Federal Radio Commission terminating the existing radio station license of appellant, holding that:

"It was the duty of the Commission before decision to notify WOQ, whose very existence was involved, and afford that station an opportunity to be heard; otherwise, there would be a denial of due process. The findings in the present case have been made without notice, the decision must be set aside

⁸⁴ 230 U. S. 139, 161, 33 Sup. Ct. 1033, 57 L. ed. 1247 (1912).

⁸⁵ 227 U. S. 88, 91, 33 Sup. Ct. 185, 57 L. ed. 431 (1912).

⁸⁶ 64 F. (2d) 550, 551-52 (1933).

and the case remanded, to the end that a proper hearing be had before the Commission "

The case of *Garfield v United States ex rel Goldsby*,⁸⁷ was an action for a writ of *mandamus* against the Secretary of the Interior to compel him to restore the enrollment of complainant as a member of an Indian nation carrying with it the right to allotment of tribal lands. The enrollment of complainant had been canceled by the Secretary of the Interior without prior notice and hearing. In affirming the judgment of the Court of Appeals of the District of Columbia which required the Secretary to recognize the complainant as an enrolled member of the nation, the Supreme Court stated:

" it has always been recognized that one who has acquired rights by an administrative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard

"The right to be heard before property is taken or rights and privileges withdrawn, which have been previously legally awarded, is of the very essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this court "

It is recognized that the law does not always require notice and hearing prior to an administrative determination, nor is it necessary that all persons affected by such a determination be afforded notice and an opportunity to be heard. This is true in the making of *quasi-legislative* as distinguished from *quasi-judicial* determinations, and in certain situations involving an exercise of the police power, but the cancellation of the air mail route certificates by the Postmaster General did not constitute either a *quasi-legislative* determination or an exercise of police power. These principles are illustrated by the following cases:

In *Spokane Hotel Company v Younger*,⁸⁸ the Supreme Court of Washington held that under Remington Code, Section 6571-1, the Industrial Welfare Commission may fix wages for women without giving notice to employers and an opportunity to be heard, for the reason that such administrative action is within the police power, and is not unconstitutional as depriving persons of life, liberty, and property without due process of law. The Court stated that this was an administrative and not a judicial determination, and the legislature could have done the same thing without notice and hearing, so the administrative body may do so also since there is no statutory provision requiring notice and hearing. The Court observed that if personal notice must be given to employers before a minimum wage and working conditions may be established by the legislature or by a commission appointed for that purpose, then such a law could not be made, because it would be almost,

⁸⁷ 211 U. S. 249 262, 29 Sup. Ct. 62, 53 L. ed. 168 (1908)

⁸⁸ 113 Wash. 359, 194 Pac. 595 (1920)

if not utterly impossible, to notify every employer of such labor within the state. Moreover the Court held employers have no vested right to employ women and children, and therefore employers are not entitled to notice as a matter of right.

In *State ex rel State Board of Milk Control v Newark Milk Company*,⁸⁹ the fixing of minimum prices by the New Jersey Milk Control Board without notice and hearing to the defendant milk company, was held not to invade defendant's constitutional rights under the due process clause of the Fourteenth Amendment of the Federal Constitution. The Court stated that in the absence of specific constitutional or statutory requirement therefor, notice of proceedings before a subordinate body exercising an administrative function, is not a prerequisite to valid action by that body, nor is a hearing required in the absence of a provision therefor in the organic or statutory law. The Court stated:

" the respondent board merely exercises the administrative function to effectuate the definitely declared legislative policy. Such regulation is purely a *legislative function*; and, even when exercised by a subordinate body, upon which it is conferred, the notice of hearing essential in judicial proceedings is not indispensable to a valid exercise of the power " (Italics supplied)

In *Commonwealth v Sissen*,⁹⁰ the Court held the Board of Fish and Game Commissioners, in exercising power delegated to it by statute of determining whether the fish of a brook or stream are of sufficient value to warrant the prohibition or regulation of the discharge of sawdust therein, and of prohibiting and regulating its discharge if so warranted, is acting in a legislative and not in a judicial capacity, and need not base its action on sworn evidence or give a hearing to a person requesting it, whose sawmill is injuriously affected by its action.

In *Bi-Metallic Investment Company v State Board of Equalization of Colorado*,⁹¹ the Court held an order of the State Board of Equalization of Colorado which increased the valuation of taxable property in the

⁸⁹ 118 N. J. Eq. 504, 179 Atl. 116, 125-26 (1935). Cf. *Miami Laundry Co. v. Florida Dry Cleaning and Laundry Board*, 134 Fla. 1, 183 So. 759 (1938), which contains dicta to the effect that regulations promulgated by an administrative board including that of price-fixing, must, in the interest of the public be done in strict compliance with the requirement of law with reference to notice and hearing.

⁹⁰ 189 Mass. 247, 75 N. E. 619 (1905). To the same effect see: *Bragg v. Weaver*, 251 U. S. 57, 58, 40 Sup. Ct. 62, 64 L. ed. 135 (1919), in which the United States Supreme Court observed, regarding the exercise of the power of eminent domain: "Where the intended use is public the necessity and expediency of the taking may be determined by such agency and in such mode as the State may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment." The Court concluded that the right to a hearing upon appeal upon the question of the adequacy of compensation for property taken pursuant to eminent domain proceedings satisfies the requirements of due process.

⁹¹ 239 U. S. 441, 36 Sup. Ct. 141, 60 L. ed. 372 (1915).

City of Denver 40 per cent without notice and hearing to the taxpayers or assessing officers of Denver before the order was made, was not in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States. In making this ruling, the Court, speaking through the late Justice Holmes, pointed out that in the event a rule of conduct applies to more than a few individuals, it is impracticable that everyone should have a direct voice in its adoption; that there is no constitutional requirement that all public acts be done in town meeting or in an assembly of the whole; and that there must be a limit to individual argument in such matters if government is to go on. The Court distinguished this case from *Londoner v City and County of Denver*,⁹² which held that in the event the legislature commits the determination of the tax to a subordinate body, due process of law under the Fourteenth Amendment requires that the taxpayer must be afforded a hearing of which he must have had notice, on the ground that a local board had to determine whether and in what amount and upon whom a tax for paving a street should be levied for special benefits. Only a relatively small number of persons who were exceptionally affected were involved.

In *Nickey v Mississippi*,⁹³ the Court held there is no constitutional command that notice of the assessment be given in advance of the assessment; it is enough that all available defenses may be presented to a competent tribunal before the exaction of the tax and before the command of the state to pay becomes final and irrevocable.

For the protection of public health, a state may order summary destruction by administrative authorities without antecedent notice and hearing. Because of public necessity, the property of citizens may be summarily seized in war time.⁹⁴

The foregoing cases illustrate that notice and hearing are not always prerequisites to procedural due process; they also demonstrate that the cases are in conflict in a measure with respect to whether or not notice and hearing are essential conditions precedent to an administrative determination. Yet it should be observed that all of the above cases are differently circumstanced from those arising out of the cancellation of the air mail route certificates and are in nowise controlling with respect to them for the reason that neither the promulgation of the cancellation order itself nor the effects which resulted therefrom were quasi-legislative in character.

The federal government frequently provides in its contracts that the "contract may be terminated by the government in whole or in

⁹² 210 U. S. 373, 28 Sup. Ct. 708, 52 L. ed. 1103 (1908).

⁹³ 292 U. S. 393, 54 Sup. Ct. 743, 78 L. ed. 1323 (1934).

⁹⁴ *North American Cold Storage Co. v. City of Chicago*, 211 U. S. 306, 29 Sup. Ct. 101, 53 L. ed. 195 (1908); *Central Union Trust Co. v. Garvan*, 254 U. S. 554, 41 Sup. Ct. 214, 65 L. ed. 403 (1921).

part by written notice whenever the contracting officer shall determine that termination is for the best interest of the government." However, there was no language of this sort in the air mail contracts or route certificates.

While breach of contract by the government may not satisfy the highest moral canon, the government may breach a contract and then respond in damages in the same manner as a private citizen, provided the government consents to be sued. It must be remembered, however, that we are dealing here with something more than an alleged breach of contract. The invocation of Section 3950 of the Revised Statutes of the United States, and the involuntary retirement of executives of American commercial air lines from the American air transport industry who had participated in the alleged May-June, 1930, Spoils Conferences, was tantamount to the imposition of a fine or criminal penalty upon the executives of the air carriers affected. It is elementary that alleged fraud, which was one of the primary reasons for the issuance of the cancellation order, is never presumed, but must be established by clear, cogent, and convincing evidence. In addition, one is presumed to be innocent until he has been proved guilty. It is therefore at once apparent that the right to notice and hearing must be read into Section 3950⁹⁵ of the Revised Statutes of the United States before the penalties prescribed by this statute are meted out. This is essentially the position which was taken by the United States Court of Appeals for the District of Columbia in *Boeing Air Transport, Inc. v. Farley*,⁹⁶ but then the Court emasculated that determination by holding there was an adequate remedy at law in the Court of Claims. Likewise it would seem that the requirement of notice and hearing would have to be read into Section 1846 of the Postal Laws and Regulations in the event this section were invoked to cancel air mail route certificates. In the event of conflict between the provisions of Section 3950 of the Revised Statutes and the Watres Act regarding the requirement of notice and hearing, it would appear that the provisions of the Watres Act, a much later statute and the governing statute relating to air mail route certificates at the time of the cancellation and which specifically prescribed forty-five (45) days' notice and hearing prior to cancellation, must control. The terms of the air mail route certificates are quite comparable to an agreement providing for the submission of differences and disputes to arbitration in respect to which courts have held that a demand or offer to arbitrate a dispute is a condition precedent to the maintenance of a suit on a con-

⁹⁵ Section 3950 of the Revised Statutes of the United States (39 U. S. C. A. § 432) was enacted on June 8 1872 (17 Stat. 283 314). An examination of all of the decisions rendered which involved § 3950 prior to the cancellation of the air mail route certificates, discloses that none of those decisions involved the question of notice and hearing prior to meting out the penalties prescribed by this statute.

⁹⁶ 64 App. Div. 162, 75 F. (2d) 765 (1935).

tract which provides for a submission of differences arising under the contract to arbitration ⁹⁷

Both by virtue of the covenants in the air mail route certificates and by virtue of the provisions of germane statutes respecting notice and hearing, notice and hearing were essential conditions precedent to lawful administrative action to effect cancellation of the air mail route certificates. The government not only covenanted not to cancel air mail route certificates prior to according notice and an opportunity to be heard to the holders of the route certificates but also the applicable statutes clearly demonstrate that it was the intention and command of Congress that the air mail route certificates should not be canceled without prior notice and hearing to the holders of the certificates. Therefore the *ex parte* findings of Farley and the issuance of the *ex parte* cancellation order, a quasi-judicial determination, based thereon, without prior notice and hearing, violated the constitutional guaranties embraced by the due process clause of the Fifth Amendment of the Federal Constitution ⁹⁸

VIII THE CONCLUSIVENESS OF FINDINGS OF HEADS OF EXECUTIVE DEPARTMENTS OF THE GOVERNMENT

A second important question raised by the air mail litigation is whether the findings of heads of executive departments are conclusive.

There is considerable decisional support for the proposition that the findings of the heads of executive departments are conclusive and should not be upset. Therefore, it has been contended that in the absence of a showing that Postmaster General Farley was clearly acting arbitrarily, the court should treat his findings of fact, to-wit, that there was collusion and fraud in the awarding of the air mail route certificates so as to eliminate competitive bidding, as conclusive.

The *quantum* of judicial review of the findings of an administrative body often depends in a large measure upon the language of the statute providing for judicial review under which an administrative body operates. Some of the criteria employed in the judicial review of administrative findings are:

- (1) That the determination of the administrative body shall be conclusive if supported by substantial evidence;
- (2) That it shall be presumed to be *prima facie* correct;

⁹⁷ *Zindorf Cont Co v Western American Co*, 27 Wash 31, 67 Pac 374 (1901); *Winsor v German Savings & Loan Society*, 31 Wash 365, 72 Pac. 66 (1903); *Herring-Hall-Marvin Safe Co v Purcell Safe Co*, 81 Wash 592, 142 Pac. 1153 (1914); judgment affirmed on rehearing 86 Wash 694, 150 Pac 1162 (1915); *Calhoun, Denny and Ewing v Pederson*, 85 Wash 630, 149 Pac. 25 (1915).

⁹⁸ Cases such as *United States v. Socony-Vacuum Oil Co, Inc*, 310 U S 150, 60 Sup Ct 811, 84 L ed 1129 (1940), which held agreements to fix prices in interstate commerce are unlawful *per se* under the Sherman Act, do not support the denial of notice and hearing prior to the cancellation of the air mail route certificates.

(3) That it shall be conclusive in the absence of arbitrary and capricious action, and

(4) That upon appeal litigant shall be entitled to a trial *de novo*

One of the most controverted contemporary phases of judicial review concerns the weight and finality that should attach to the findings of an administrative body. The United States Supreme Court, speaking through the late Justice Brandeis, has stated that it has long been settled that determinations of fact for ordinary administrative purposes are not subject to review.⁹⁹ Courts have no power to interfere unless there was either a denial of a hearing¹⁰⁰ or the finding was not supported by evidence,¹⁰¹ or an erroneous rule of law was applied.¹⁰² It may be said with measurable assurance that only when the administrative process is conducted with competent personnel and in a lawful manner, can it be expected that courts will not find formulas to deprive administrative determinations of finality. True, the Interstate Commerce Commission, especially during its early years, lost a number of cases in the Supreme Court of the United States, but on the whole, its record for being sustained in the courts is very good, thus demonstrating that administrative determinations will be sustained upon appeal to the courts if they are judiciously and painstakingly made.

We now consider two cases which illustrate the great deference which the United States Supreme Court has accorded to administrative action of the Post Office Department, particularly in situations in which the exercise of administrative discretion is involved.

In the case of *National Life Insurance Company of the United States of America v National Life Insurance Company*,¹⁰³ the firm names were very similar, and one firm claimed that most of the mail belonged to it, and hence should be delivered to it. The Post Office Department issued an order to the effect that the mail so addressed should be delivered to the one which adopted the name first. In contesting this ruling of the Post Office Department, the Court stated that the complainant was really appealing from the discretion of the Post Office Department to the discretion of the Court, and the Court refused to interfere, stating:

"A court in such case ought not to interfere in the administration of a great department like that of the Post Office by an injunction, which directs the department how to conduct

⁹⁹ *Phillips v Commissioner of Internal Revenue* 283 U S 589, 51 Sup Ct 608, 75 L ed 1289 (1931)

¹⁰⁰ *Chin Yow v United States*, 208 U S 8, 28 Sup Ct 201, 52 L ed 369 (1908)

¹⁰¹ *American School of Magnetic Healing v McAnnulty*, 187 U S 94, 23 Sup Ct 33, 47 L ed. 90 (1902)

¹⁰² *Ng Fung Ho v White*, 259 U S 276, 42 Sup Ct 492, 66 L ed. 938 (1922)

¹⁰³ 209 U S 317, 325, 326, 28 Sup Ct 17, 49 L ed 147 (1908)

the business thereof, where the party asking for the injunction has no clear right to it "

In *United States ex rel Milwaukee Social Democratic Publishing Company v Burleson, Postmaster General of the United States*,¹⁰⁴ the Court sustained the action of the Third Assistant Postmaster General in revoking, after notice and hearing, the second-class mail privilege granted the relator on the ground that it contained articles which were violative of the Espionage Act. The Court stated:

" there remains the question of whether substantial evidence to support his order may be found in the facts stated in the Postmaster General's answer, which are admitted by the demurrer, for the law is, that the conclusion of the head of an executive department of the government on such a question, when within his jurisdiction, will not be disturbed by the courts, unless they are clearly of the opinion that it is wrong "

However, as has already been noted, in certain cases courts have not hesitated to set aside indefensible findings and determinations of heads of executive departments of the federal government. Even though the act of annulment involved a discretionary act, it would seem that the courts may set aside an order of the Postmaster General if either procedural due process or existing statutory law requires that the parties affected by such an order be accorded notice and hearing prior to the issuance of the order.

In view of the fact that the right to cross-examine, the opportunity to be heard, the right to present witnesses, the right to have findings made, and the right to have an order entered based upon findings, were not accorded to the holders of the air mail route certificates prior to the making of findings and the issuance of the cancellation order by the Postmaster General, the constitutional requirements of due process were not satisfied in the preparation of the findings of the Postmaster General and the entry of the cancellation order.

There cannot be too great interference with the heads of executive departments of the federal governmental establishment for the functions of the government must not be unduly impeded, but the findings of administrative officials should satisfy the constitutional and statutory requirements of due process. If notice and hearing were essential conditions precedent to the preparation of the findings of the Postmaster General and to the issuance of the cancellation order, courts should not hesitate to go behind the factual determination of the Postmaster General, even though the issuance of the order involved the exercise of administrative discretion, and to set aside the findings and cancellation order of the Postmaster General when they are framed in complete disregard of the constitutional requirements of due process.

¹⁰⁴ 255 U S 407, 413, 41 Sup Ct 352, 60 L. ed. 704 (1921)

IX THE SCOPE OF GOVERNMENTAL IMMUNITY

A third important question raised by the air mail litigation is the extent to which the government and its agents are amenable to suit.

In their actions in the constitutional courts the air transport companies did not seek damages against Farley or the government, but brought bills in equity for injunctive relief, insisted that the damages they were sustaining were irreparable, and that there was no adequate remedy at law. However, the efforts to obtain injunctive relief proved abortive. The courts refused to pass upon the question of the right to injunctive relief for the reason that the federal government and one of its agents, Farley, were considered to be the parties defendant. We now inquire into the soundness of this ruling.

The rule that no state can be sued without its consent is well established in the law.¹⁰⁵ This doctrine is premised on two quite distinct considerations: First, that the state is sovereign. Second, that the courts will not interfere with the process of government by controlling discretionary acts of officials. Hence, in the event objection is raised that a given suit is one against the state, it is necessary to determine whether it is directed against the sovereign as such, or is one which involves interference with executive discretion.

Was the sovereign sued in the air mail cases? If it had been the nominal party defendant, obviously it would have been. Yet, since it was not named as a party defendant, the question is presented as to whether or not the government of the United States had such an interest in the outcome that the suits were in reality against it. A direct property right in the subject of the controversy is such an interest.¹⁰⁶ If the effect of a decree would be to enforce specific performance against the

¹⁰⁵ *Monaco v. Mississippi*, 292 U. S. 313, 321, 54 Sup. Ct. 745, 78 L. ed. 1282 (1934), held the United States Supreme Court has no jurisdiction of a suit brought by a foreign state, namely the principality of Monaco, against a state of the Union without her consent.

At the time the Federal Constitution was adopted, it was the clear understanding of the advocates of the Federal Union that the individual states would not thereby be subjected against their will to the suits of individuals. This view applied with even greater force to the central government. Alexander Hamilton shared the view that a state could not be made amenable to suit without its consent for the reason that such exemption was inherent in the nature of sovereignty (*THE FEDERALIST*, New York: M. Walter Duane (1901) 81, 125, 126). James Madison and John Marshall held the same view, and thus the immunity of the state was assumed as a matter of course (*R. D. WATKINS, THE STATE AS A PARTY LITIGANT*, Baltimore, The John Hopkins Press (1921) 50). Following the pronouncement of the contrary view in *Chisholm v. Georgia*, 2 Dall. 419, 1 L. ed. 440 (1793), the Eleventh Amendment to the Federal Constitution was quickly proposed and unanimously adopted, providing that the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state.

¹⁰⁶ *Belknap v. Schild*, 161 U. S. 10, 16 Sup. Ct. 443, 40 L. ed. 599 (1896); *Oregon v. Hitchcock*, 202 U. S. 60, 26 Sup. Ct. 568, 50 L. ed. 935 (1906); *United States ex rel. Goldberg v. Daniels*, 231 U. S. 218, 34 Sup. Ct. 84, 58 L. ed. 191 (1913).

state, the suit cannot be maintained. It will be recalled that it was on this ground that relief was denied in *Transcontinental and Western Air Lines, Inc v Farley*,¹⁰⁷ in the Southern District Court of New York; the United States was held to be an indispensable party if one of the agents of the government is alleged to be acting outside the scope of his authority. The Court held the plaintiff company could not obtain specific performance of its contract against the United States and interfere with the process of government without at least making it a party, and since no consent to be sued had been granted by the government, the suit could not be maintained.

In the actions for injunctive relief, the air transport companies asserted they did not ask that the payment for their services be authorized; that the mail be delivered to their airplanes; or that they be assured of specific performance of the contracts or route certificates. They prayed merely that defendant Farley be enjoined from unlawfully interfering with their contract with the United States. Counsel for the air transport companies distinguished *Wells v Roper*,¹⁰⁸ which had been relied upon by defendant, on the ground that it is limited to the proposition that an official of the United States may not be enjoined when acting "solely in his official capacity and within the scope of his duties."¹⁰⁹

It is clear that courts have treated cases of this nature as attempts to secure specific performance and as suits against the United States. Nevertheless, it would seem that even though the United States has a property interest in the mails,¹¹⁰ when arbitrary action on the part of an executive officer is in issue, and there is a *prima facie* showing that he acted outside the scope of his authority, and when no prior notice and hearing are provided before taking administrative action of a quasi-judicial character, then the argument that the one seeking relief would in effect thereby cause the government specifically to perform its contract, should not preclude the court from passing on the merits of the case, and restraining the arbitrary and unlawful administrative action, if it finds it to obtain or to be threatened.

In *Delaware Railroad Company v Weeks, Secretary of War*,¹¹¹ in a suit by a railroad against the Secretary of War and the engineer in charge of improvements in a canal to enjoin the removal of a bridge and threatened criminal prosecution, it was held not to be a suit against

¹⁰⁷ 71 F (2d) 288 (1934)

¹⁰⁸ 246 U S 335, 38 Sup Ct 317, 62 L ed 755 (1918)

¹⁰⁹ *Boeing Air Transport, Inc, et al v Farley* (C A, Dist of Col), 75 F (2d) 765 (1935)

¹¹⁰ *In re Debs*, 158 U S 564, 15 Sup Ct 900, 39 L ed 1092 (1895)

¹¹¹ 293 Fed 114 (D. C, Del) (1923). In *United States v Clarke*, 8 Pet 436, 8 L ed 1001 (1834), the Court, speaking through Chief Justice Marshall, stated that the United States was not suable of common right, and unless the plaintiff could bring his suit within the terms of some permissible act of Congress, the Court could not entertain it.

the United States, and the complainants were held entitled to invoke the protection of the federal district court

In *Magruder v Belle Fourche Valley Water Users' Association*,¹¹² a suit was instituted against executive officers of the United States to enjoin them from unlawfully diverting water in alleged violation of law, to the irreparable injury of the property rights of the plaintiff. It was held that this was not a suit against the United States, nor that it, or the injunction sought, objectionable, either on the ground that they interfere with the property or the possession of the property of the United States, or on the ground that they compel specific performance of its contracts.

The concept of the non-suability of the state was one of the prime reasons for the institution of the Court of Claims of the United States. In the early days, if one had a claim against the United States, he simply went to Congress and presented his claim to the appropriate committee in Congress. It was allowed or disallowed, and that practice continued for many years. Obviously, even if a court were to assume jurisdiction, one could not levy execution against the United States. This was a very undesirable system; Congress was overburdened with matters of private concern that required judicial investigation rather than legislation. No one had any assurance that just claims would be paid, or that unjust and spurious claims would be detected, or if detected, would be rejected. It was not until February 24, 1855, that Congress created the Court of Claims, thereby permitting the government to be sued in certain specified cases. The inability of the holders of the air mail route certificates to obtain injunctive relief in this forum before their alleged damage had been sustained, made them consider this forum as far from adequate for their needs.

With the marked extension of governmental activity into fields hitherto regarded, at least in countries with the common law tradition, as within the province of private enterprise, the conflict of government with private interest has been greatly accentuated and has demonstrated the necessity of giving fresh consideration to the whole subject of governmental immunity.¹¹³

There is a growing torrent of criticism of the doctrine of non-suability of the state in Anglo-American jurisdictions. It has been forecast that we shall see increasing encroachment in countries of English law upon the hitherto sacred domain of sovereign non-responsibility, and an approach to the continental theory of responsibility of the modern sovereign in its own courts.

"That the absolute immunity of the sovereign from direct personal suit abroad, save with its consent, will probably en-

¹¹² 219 Fed 72 (C C A) (1914)

¹¹³ Ernest Angell, *Sovereign Immunity—The Modern Trend* (1925-26) 35 YALE L J 150

ture for many years; but the immunity of the sovereign from suit at home is being weakened by legislative consent, by the critical onslaught of writers, and by the growing disfavor toward the doctrine in the courts."¹¹⁴

The present general trend of congressional opinion is to extend the area within which the government is amenable to suit. This is frequently accomplished through the insertion of the key words "to sue and be sued" in the statute which creates a governmental agency. The case of *Keifer and Keifer v Reconstruction Finance Corp.*,¹¹⁵ certainly demonstrates this trend. In holding a Regional Agricultural Credit Corporation, chartered by the Reconstruction Finance Corporation by authority of Section 201(e) of the Emergency Relief and Construction Act of 1932, subject to suit, Justice Frankfurter, speaking for the Court, observed:

"Because of the advantages enjoyed by the corporate device compared with conventional executive agencies, the exigencies of war and the enlarged scope of government in economic affairs have greatly extended the use of independent corporate facilities for governmental ends. In spawning these corporations during the past two decades, Congress has uniformly included amenability to law. Congress has provided for not less than forty of such corporations discharging governmental functions, and without exception, the authority to-sue-and-be-sued was included. Such a firm practice is partly an indication of the present climate of opinion which has brought governmental immunity from suit into disfavor, partly it reveals a definite attitude on the part of Congress which should be given hospitable scope."

X JURISDICTION OF COURTS TO RESTRAIN ACTS OF GOVERNMENTAL OFFICERS WHICH FALL OUTSIDE THE SCOPE OF THEIR AUTHORITY

The United State Supreme Court has repeatedly upheld the principle that the government can only act within the limits prescribed by the Constitution. One of these limits is that no person shall be deprived of liberty or property without due process of law. Ever since *Marbury v Madison*,¹¹⁶ it has been established that the function of confining the activities of the respective branches of the government within the limits defined in the Constitution is a function of the judicial branch.

Under the doctrine of the supremacy of law, and its corollary, that of the responsibility of governmental agents to the law, any official who transcends the authority with which he is clothed by the law, becomes responsible for his wrongful act; he is amenable to the authority of the ordinary courts, and the ordinary courts have jurisdiction to determine what is the extent of his legal power and whether the orders under which he has acted were legal and valid.

¹¹⁴ *Ibid* 151-53

¹¹⁵ 306 U S 381, 390, 391, 59 Sup. Ct 516, 83 L. ed 784 (1939)

¹¹⁶ 1 Cranch 137, 2 L. ed 60 (1803)

"Broadly speaking any official who exceeds the authority given him by the law incurs a personal responsibility at common law for his act, and is amenable to the authority of the ordinary courts of justice. That principle is one of the foundations of administration according to law."¹¹⁷

The United States Supreme Court has stated the basic principle that the function of the courts is to enforce the constitutional limitations against governmental agents, as follows:

"Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. *The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities as well against the powers of numbers as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of government.*"¹¹⁸ (Italics supplied)

The United States Supreme Court has repeatedly applied this doctrine. It has frequently affirmed and directed the issuance of injunctions to restrain cabinet officers and their subordinates from the commission of acts which are violative of constitutional prohibitions or otherwise unauthorized by law.¹¹⁹

In *Noble v Union River Logging Railroad Company*,¹²⁰ the Secretary of the Interior had issued an order revoking a right of way over public lands granted to the railroad by defendant's predecessor in office. The railroad brought a bill in equity to enjoin the Secretary of the Interior from executing the order and molesting the plaintiff in the enjoyment of his right of way. The Supreme Court of the District of Columbia granted the injunction and the United States Supreme Court affirmed it, holding that the Secretary of the Interior's purported order of revocation was void because it was an attempt to deprive the plaintiff of its property without due process of law, and was therefore beyond the scope of his authority. The Court held that the rule that *mandamus* would lie to enforce performance of ministerial duties

"applies to a case wherein it is contended that the act of the Head of a Department, under any view that can be taken of the facts that were laid before him, was *ultra vires* and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an in-

¹¹⁷ WILLIAM A. ROBSON, *JUSTICE AND ADMINISTRATIVE LAW*, London, Macmillan & Co. (1928) 55.

¹¹⁸ *Hurtado v California* 110 U S 516, 536, 4 Sup Ct 111, 28 L ed 232 (1884); A. V. DICEY, *INTRODUCTION TO THE STUDY OF LAW OF THE CONSTITUTION* London, Macmillan & Co., 8th ed (1915) 193, 194, 202, 203; JOHN DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW*, Cambridge Harvard University Press (1927) 32 *et seq*.

¹¹⁹ *Goltra v Weeks* 271 U S 536, 544, 46 Sup Ct 102, 70 L ed 404 (1926).

¹²⁰ 147 U S 165, 13 Sup Ct 271, 37 L ed 123 (1892).

junction as he would be to a mandamus if he refused to do an act which the law plainly required him to do."¹²¹

In *American School of Magnetic Healing v. MacAnnulty*,¹²² the Postmaster General, after hearing the school, made a determination of fraudulent use of the mails "upon evidence satisfactory to him," and forbade the local postmaster to pay any postal money orders drawn to the order of the school. The Postmaster General purported to act by authority of certain congressional statutes providing for the suppression of lottery traffic. The Supreme Court held that the local postmaster should be restrained from carrying out the order of the Postmaster General because the determination and order of the Postmaster General were not authorized by the statute pursuant to which he purported to act, despite the fact that he gave plaintiffs a hearing upon notice before his determination.

The Court restated the principle of responsibility of the administrative officers to the law, in language of a similar character to that of Robson, *supra*:

"That the conduct of the post office is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head or one of the subordinate officials of that department which is authorized by the statute under which he assumes to act. *The acts of all of its officers must be justified by some law, and in case an official violates the law to the injury of an individual, the courts generally have jurisdiction to grant relief.*

"Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual."¹²³ (*Italics supplied*)

It is clear that the doctrine of sovereign immunity from suit protects only those acts of governmental agents which are within the scope of their validly delegated authority, and which therefore are acts of the state. It does not shield governmental agents when they act outside of powers legally possessed by them, nor, *a fortiori*, when they act outside the powers possessed by the State itself, that is, as limited by the Constitution.¹²⁴ Such acts are individual acts and the governmental agents committing them are individually responsible therefor.

One of the leading Supreme Court cases on the distinction between suits against governmental officers to restrain authorized acts, which

¹²¹ *Ibid.* 147 U. S. 165, 171, 172.

¹²² 187 U. S. 94, 23 Sup. Ct. 33, 47 L. ed. 90 (1902).

¹²³ *Ibid.* 187 U. S. 94, 108, 110; *Santa Fe Pacific R. R. v. Fall*, Secretary of Interior, 259 U. S. 197, 42 Sup. Ct. 466, 66 L. ed. 896 (1921); *Poindexter v. Greenhow*, 114 U. S. 270, 290, 5 Sup. Ct. 903, 29 L. ed. 185 (1884).

¹²⁴ *Payne, Secretary of the Interior v. Central Pacific Ry.*, 255 U. S. 228, 41 Sup. Ct. 314, 65 L. ed. 598 (1921).

are thus acts of the state, and suits to restrain the performance of unauthorized acts, which are thus not really suits against the state, is *Ex Parte Young*,¹²⁵ in which the Supreme Court affirmed a decision granting an injunction restraining the Attorney General of Minnesota from enforcing an unconstitutional statute. The Court disposed of the Attorney General's contention that this was a suit against the State by saying:

"The answer to this is the same as made in every case where an official claims to be acting under the authority of the State

If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart him any impunity from responsibility to the supreme authority of the United States."

In *Sterling v Constantin*,¹²⁶ the Supreme Court of the United States held that the chief executive officer of a state, to-wit, the Governor, had been properly enjoined from preserving law and order, as he conceived it, by declaring martial law in certain oil-producing counties, when in so doing he overstepped the limits of the Federal Constitution.

A review of the cases in which courts either have or have not set aside acts of administrative officials, indicates that governmental administrative action cannot be enjoined at the whims and fancies of a given individual or corporation. However, it is also clear that in the event a governmental officer or agent acts either outside the scope of his authority or in disregard of the requirements of procedural due process and a sufficient showing is made so as to cast substantial doubt on the validity of his action and findings, the courts do and should entertain jurisdiction. The *ratio decidendi* of a number of the above cases demonstrates that if the courts had been disposed to entertain jurisdiction in the suits against Postmaster General Farley and to enjoin the application of the cancellation order, there was ample precedent available for such a judicial determination.

XI THE AIR MAIL ROUTE CERTIFICATE CANCELLATION EXPERIENCE VIEWED IN RETROSPECT

To recapitulate, the cancellation of the air mail route certificates prevented the continued accumulation of huge profits by private enterprise, and thereby effected economies for the benefit of the general American public, prevented the repetition of fraud, such as accompanied the construction of the railroads in this country, invoked the declaration of policy embodied in the United States Revised Statutes Section 3950 to

¹²⁵ 209 U. S. 123, 159, 160, 28 Sup. Ct. 441, 52 L. ed. 714 (1907).

¹²⁶ 287 U. S. 378, 53 Sup. Ct. 190, 77 L. ed. 375 (1932).

prevent commercial air lines from combining to avoid competitive bidding, caused reflection upon the wisdom of long term contracts, and our whole contract and route certificate system for the transportation of mail via airplanes. Many of the results which flowed from the cancellation are certainly desirable.

Conceding that the cancellation of the air mail route certificates resulted in equipping us to cope with air mail regulation more effectively; many have deprecated the summary action by which the route certificates were swept aside, and have insisted that if excessive rates were being paid, the Postmaster General could have reduced them without the cancellation of the route certificates. They have insisted that the means used to attain the desired ends can scarcely be defended as sound, just, equitable, and in consonance with American legal, constitutional, and ethical principles and norms of conduct.

Others, however, have considered the cancellation of the certificates desirable, even though summary and of questionable legality, because it gave an added impetus to the study of air mail and enabled Congress to draft efficacious legislation relating to the whole subject of aeronautics.¹²⁷

Now that over a decade has passed since the issuance of the cancellation order and the partisan feelings which it generated have cooled, we may view the whole picture with a sense of detachment and more nearly see it in its true perspective. It should be kept in mind that during Brown's administration two controlling motives governed the economic *modus operandi* of commercial air lines:

- (1) To expand as fast as possible and to extend their area of operations within as much additional territory as possible
- (2) To make demands upon Congress for additional air mail compensation

Immediately preceding and at the time of the cancellation of the air mail route certificates, the commercial air lines had to rely almost entirely on air mail for revenue because there was relatively little passenger business at that time. Brown sought to keep down and reduce the cost of transportation of air mail and to keep efficiency up. Brown asserted that the practice of the commercial air lines of seeking higher air mail compensation from Congress must cease or the cost of transporting air mail would soon become prohibitive. Brown did not believe in cutthroat competition; he wanted to set up a self-contained system of commercial air lines with sufficient volume of traffic to become self-sustaining. Brown felt that it was undesirable to have small air lines enter the field, and if such wildcat small air lines entered the field to

¹²⁷ *Hearings before Special Senate Investigating Committee—Investigation of Air Mail and Ocean Mail Contracts*, 73d Cong., 2d Sess. (1934) Pt 7, 28

compete with the larger commercial air lines which were already operating, larger appropriations would be required for the transportation of air mail. Therefore, Brown felt the introduction of small commercial air lines in competition with the existing established air lines would be inimical to the public interest.

In order to implement these views Brown requested the holders of air mail route certificates to come to the Post Office Department at Washington, D. C., for a conference regarding air mail, and former air mail executives who attended the so-called May-June Spoils Conferences and who do not wish to be quoted have now conceded that they were summoned for the purpose of reaching an agreement upon a division of territory among the commercial air lines for the transportation of air mail. However, the air mail executives have asserted that since Brown called upon them to attend these conferences, they were obliged to attend them, since the Postmaster General had the power of life and death over them. Yet the attempt to form such an agreement, whether or not it was actually consummated, cannot be defended under Section 3950 of the Revised Statutes even though Brown no doubt was prompted by what he conceived to be most compatible with the public interest. The New Deal was quick to assail the attempt by Brown to make any agreement for apportionment of territory in contravention of Section 3950 of the Revised Statutes as being contrary to the public interest. Unquestionably both Brown and Farley were moved by what they conceived to be a high conception of the public interest, but both shared divergent viewpoints of how the public interest could best be served in the transportation of air mail under existing law. Brown was ahead of his time in his conception of the regulation of air mail transportation, and his views eventually came to be accepted by the inclusion of provision for issuance of route certificates in the Civil Aeronautics Act of 1938 which marked a sharp departure from the philosophy of competitive bidding in air mail transportation, but Brown was not clothed with authority by Congress to carry out his views for the restriction of competition in air mail transportation during his administration.

While the Constitution of the United States contains no prohibition against impairment of the obligation of contracts by the federal government, no affirmative express or implied power has been granted to Congress to impair the obligations of a contract between private parties by direct legislation, save when rights have been reserved, in the exercise of the police power, and by the enactment of uniform laws on the subject of bankruptcy. Nor has any such power been conferred upon the Executive Department, either expressly or by implication, by the Constitution, and the federal government is, of course, subject to the "due process" clause of the Fifth Amendment of the Federal Consti-

tution These restrictions operate upon legislative as well as executive power, and require that the rules of procedural due process be observed

Administrative officials of the United States Government enjoy a favored position because they are discharging governmental functions, dealing with government property, and necessarily are performing discretionary acts in which the courts are reluctant to substitute their judgment for that of the duly constituted administrative official In the light of this fact administrative officials should be solicitous to satisfy the requirements of procedural due process and if administrators desire to have a sense of finality attach to their quasi-judicial determinations and to have them command respect and public confidence, in the event there is doubt in the mind of the administrative official as to whether, under constitutional and/or statutory provisions, notice and hearing must precede administrative action, the doubt should be resolved in favor of the private citizen

If the findings of executive officers and the departments of the government are to be regarded as final, not only must the essential requisites of due process be complied with, but also appropriate administrative machinery must be instituted and manned by competent personnel with unimpeachable integrity who will command the confidence of litigants and parties appearing before them, and of the public generally In the discharge of their *quasi-legislative* duties, administrators must order their affairs so as to consider both divergent viewpoints and what seems right to the community at large in the formulation of policies The discharge of *quasi-judicial* functions must be characterized by a determination to be guided only by objective criteria in decision-making ¹²⁸

The decisions reached by quasi-legislative and quasi-judicial bodies and by administrative officers, such as the Post Office Department and the Postmaster General, will be more favorably received and respected if the elements of due process are adhered to, and administrative proceedings are judiciously conducted so as to reflect a complete and fair administrative consideration and sound and well-considered deliberation The utilization of informal procedures is not incompatible with proper administrative process, but too great celerity of determination may result in an incorrect determination, and accuracy should not be sacrificed to speed unless the situation at hand is a most compelling one, requiring immediate attention Courts should not be hesitant to set aside administrative action even though it involves interference with administrative discretion if the exercise of that discretion has not been preceded or accompanied by a scrupulous observance of the constitutional and/or statutory requirements of procedural due process

In an era which is witnessing the exit of *laissez faire* philosophy in

¹²⁸ C J FRIEDRICH and EDWARD S MASON, *PUBLIC POLICY*, Cambridge, Harvard University Press (1940) 1-24

no small measure, it is not only sound policy, but also just and equitable that the doctrine of governmental immunity should continue to recede still further in order that private persons, companies, and corporations who hold contracts with the federal government may seek and obtain more seasonable relief than is afforded in many instances at the present time. No executive officer of the government, however high his position, should be permitted to set law at defiance with impunity. Procedural due process should be strictly adhered to by the government in all its contractual relations with private enterprise, and the government of the United States should be solicitous to adhere to its contractual commitments to prevent a miscarriage of justice, to inspire public confidence with respect to governmental contracts, and to maintain a high moral tone in contractual relations between the United States Government and its citizens.

It was in the Court of Claims that the holders of the air mail route certificates had their first opportunity to present the question of due process, since the constitutional courts referred the air mail litigants to their remedy in the Court of Claims. Nevertheless the Court of Claims did not rule on the due-process-notice-and-hearing question, even though it was squarely presented to it for a ruling. Even if the Court of Claims had passed on this question, that would not have satisfied the requirements of procedural due process with respect to quasi-judicial administrative determinations, for with respect to such quasi-judicial as distinguished from quasi-legislative determinations, notice and hearing must be accorded before the administrative body which makes the determination, except in cases involving the exercise of the police power, such as for the regulation of the public health, public morals, and the public safety, or seizure of property by reason of public necessity during war.

Surveying the whole air mail cancellation picture in retrospect, it seems that we could have made the progress we have made in air mail regulation and aeronautic administration without the summary wholesale cancellation of contracts and air mail route certificates without notice and hearing. The air mail certificate cancellation experience should serve to remind administrators and administrative agencies that they should not lose sight of the fact that they are creatures of statute, and should not assume powers with which they have not been clothed. True, the public interest must be subserved and public rights must be protected, and therefore, at times, cancellation of government contracts may become necessary, but it must also be remembered that individual rights must not just be brushed aside. In view of the fact that legal remedies against administrative invasions of individual rights are very limited, courts should be very vigilant to insure that adequate recognition is given to procedural safeguards by administrative officials, and that the

requirements of procedural due process are observed. While it is conceded that the air mail route certificates could have been canceled on grounds other than fraud or the elimination of competitive bidding, yet since these factors were the fundamental reasons for the cancellation, the requirements of due process should have been complied with prior to cancellation. The issuance of the cancellation order not only reflected a departure from the moral canons which should characterize governmental action, but also a gross and unlawful violation of procedural due process under the Fifth Amendment of the Federal Constitution.

It is to be hoped that as a result of the air mail route certificate cancellation experience, in the future, if administrative officials feel the public interest requires the cancellation of governmental contracts or route certificates, the essential elements of procedural due process will be carefully observed. The air mail cancellation experience has poignantly demonstrated that a respect and scrupulous regard by administrative officials of the federal government of the requirements of procedural due process in the future in cases circumstanced as were the air mail contracts and air mail route certificates, will be a wholesome and constructive force in American life.